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MONTANA LEGISLATIVE HISTORY

Chapter 441 19 87

Bill H _____ S 160 Original bill & history ✓ C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Mar 13	✓ C	Hearing Date(s)	Jan 28	✓ C
	Mar 23	✓ C			C
		C			C
		C			C
Date Out	Mar 23	✓ C		Feb 3	✓ C

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

1/20	REFERRED TO NATURAL RESOURCES		
2/11	HEARING		
2/18	DIED IN COMMITTEE ON TIE VOTE		

SB 160 INTRODUCED BY MAZUREK
REVISE GENERAL LAWS ON STATUTES OF LIMITATION
BY REQUEST OF MONTANA SUPREME COURT AND THE SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE

1/20	INTRODUCED		
1/20	REFERRED TO JUDICIARY		
1/29	HEARING		
2/04	COMMITTEE REPORT--BILL PASSED AS AMENDED		
2/07	2ND READING PASSED	47	0
2/10	3RD READING PASSED	50	0
	TRANSMITTED TO HOUSE		
2/18	REFERRED TO JUDICIARY		
3/13	HEARING		
3/23	COMMITTEE REPORT--BILL CONCURRED AS AMENDED		
3/28	2ND READING CONCURRED	90	0
3/30	3RD READING CONCURRED	97	1
	RETURNED TO SENATE WITH AMENDMENTS		
4/02	2ND READING AMENDMENTS CONCURRED	49	0
4/03	3RD READING AMENDMENTS CONCURRED	48	0
4/06	SIGNED BY PRESIDENT		
4/07	SIGNED BY SPEAKER		
4/07	TRANSMITTED TO GOVERNOR		
4/09	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 441 EFFECTIVE DATE: 10/01/87		

SB 161 INTRODUCED BY MAZUREK, BROWN, R., BLAYLOCK, ET AL.
REPEAL SUNSET PROVISION OF TWO SUPREME COURT ASSOCIATE JUSTICE POSITIONS

1/20	INTRODUCED		
1/20	REFERRED TO JUDICIARY		
1/21	FISCAL NOTE REQUESTED		
1/30	HEARING		
2/05	COMMITTEE REPORT--BILL PASSED		
2/09	FISCAL NOTE RECEIVED		
2/09	2ND READING PASSED	37	12
2/11	3RD READING PASSED	33	15
	TRANSMITTED TO HOUSE		
2/18	REFERRED TO STATE ADMINISTRATION		
3/05	HEARING		
3/05	COMMITTEE REPORT--BILL CONCURRED		
3/07	REREFERRED TO APPROPRIATIONS		
3/18	HEARING		
3/18	COMMITTEE REPORT--BILL CONCURRED		
3/28	2ND READING CONCURRED AS AMENDED	82	11
3/30	3RD READING CONCURRED	77	21
	RETURNED TO SENATE WITH AMENDMENTS		
4/03	2ND READING AMENDMENTS CONCURRED	50	0
4/04	3RD READING AMENDMENTS CONCURRED	47	2
4/06	SIGNED BY PRESIDENT		
4/06	SIGNED BY SPEAKER		
4/06	TRANSMITTED TO GOVERNOR		

SENATE BILL NO. 160

INTRODUCED BY MAZUREK

BY REQUEST OF THE MONTANA SUPREME COURT AND
THE SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE

IN THE SENATE

JANUARY 20, 1987	INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY.
FEBRUARY 4, 1987	COMMITTEE RECOMMEND BILL DO PASS AS AMENDED. REPORT ADOPTED.
FEBRUARY 5, 1987	PRINTING REPORT.
FEBRUARY 7, 1987	SECOND READING, DO PASS.
FEBRUARY 9, 1987	ENGROSSING REPORT.
FEBRUARY 10, 1987	THIRD READING, PASSED. AYES, 50; NOES, 0.
	TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 18, 1987	INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY.
MARCH 23, 1987	COMMITTEE RECOMMEND BILL BE CONCURRED IN AS AMENDED. REPORT ADOPTED.
MARCH 28, 1987	SECOND READING, CONCURRED IN.
MARCH 30, 1987	THIRD READING, CONCURRED IN. AYES, 97; NOES, 1.
	RETURNED TO SENATE WITH AMENDMENTS.

IN THE SENATE

APRIL 2, 1987 — RECEIVED FROM HOUSE.

SECOND READING, AMENDMENTS CONCURRED IN.

APRIL 3, 1987 — THIRD READING, AMENDMENTS CONCURRED IN.

SENT TO ENROLLING.

Senate BILL NO. 160

INTRODUCED BY

BY REQUEST OF THE MONTANA SUPREME COURT AND
THE SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND CLARIFY THE LAWS RELATING TO STATUTES OF LIMITATION ON THE COMMENCEMENT OF A CIVIL ACTION; AND AMENDING SECTIONS 27-2-102, 27-2-301, 27-2-401, 27-2-402, 27-2-408, AND 27-2-409, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-2-102, MCA, is amended to read:

"27-2-102. When action commenced. (1) For the purposes of statutes relating to the time within which an action must be commenced~~,~~:

(a) a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action;

(b) an action is commenced when the complaint is filed.

(2) Unless otherwise provided by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued, does not postpone the beginning of the period of limitation.

(3) The period of limitation does not begin on any claim or cause of action for an injury to person or property until the injury has been discovered or, in the exercise of due diligence, should have been discovered by the injured party if:

(a) the injury is by its nature concealed or self-concealing; or

(b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

(4) Subsection (3) does not apply to actions involving the limitations contained in 27-2-205."

Section 2. Section 27-2-301, MCA, is amended to read:

"27-2-301. When demand necessary to perfect right to action. Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the ~~right--to-make-the~~ demand is ~~complete~~ made, except ~~in-one-of-the-following-cases:~~

~~(1)~~--Where where the right grows out of the receipt or detention of money or property by an agent, trustee, attorney, or other person acting in a fiduciary capacity,

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the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends.

~~(2)--Where--there-was-a-deposit-of-money-not-to-be-paid at-a-fixed-time-but-only-upon-a-special-demand-or-a-delivery of-personal-property-not-to-be-returned,-specifically-or--in kind,--at-a-fixed-time-or-upon-a-fixed-contingency,--the-time must-be-computed-from-the-demand.~~"

Section 3. Section 27-2-401, MCA, is amended to read:

"27-2-401. When person entitled to bring action is under a disability. (1) If a person entitled to bring an action mentioned in part 2, except 27-2-211(3), is, at the time the cause of action accrues, either a minor, seriously mentally ill, or imprisoned on a criminal charge or under a sentence for a term less than for life, the time of such disability is not a part of the time limited for commencing the action. However, the time so limited cannot be extended more than 5 years by any such disability except minority ~~or, in-any-case,-more-than-1-year-after-the--disability--ceases~~.

(2) If an action is barred by 27-2-304, any of the heirs, devisees, or creditors who at the time of the transaction upon which the action might have been founded was under one of the disabilities mentioned in subsection (1) may, within 5 years after the cessation of such disability, maintain an action to recover damages. In such

action he may recover such sum or the value of such property as he would have received upon the final distribution of the estate if an action had been seasonably commented by the ~~executor-or-administrator~~ personal representative.

(3) No person may avail himself of a disability unless it existed when his right of action or entry accrued.

(4) When two or more disabilities coexist at the time the right of action or entry accrues, the limitation does not attach until ~~they~~ all are ~~both~~ removed."

Section 4. Section 27-2-402, MCA, is amended to read:

"27-2-402. When defendant is out of state. ~~If-when~~ When the cause of action accrues against a person ~~he~~ who is out of the state and cannot be served with process, the action may be commenced within the term herein limited after his return to the state; and if after the cause of action accrues he departs from the state and cannot be served with process, the time of his absence is not part of the time limited for the commencement of the action."

Section 5. Section 27-2-408, MCA, is amended to read:

"27-2-408. ~~Effect--on~~ Assertion of counterclaim ~~of termination--of--action~~. (1) ~~Whenever--a~~ A defendant ~~in-an action-has-interposed-an-answer-in-support-of-which-he-would~~ be is entitled to assert against a plaintiff, by pleading or amendment, any ~~rely--at--the--trial--upon--a--defense---or~~ counterclaim arising out of the transaction or occurrence

that is the subject matter of the plaintiff's claim against him.

(2) The time period between the commencement and termination of an action is not part of the time limit for the commencement of an action by a defendant to recover for a counterclaim or to interpose it in that action or another action by the same plaintiff or a successor arising out of the same transaction or occurrence ~~then existing in his favor the remedy upon which, at the time of the commencement of the action, was not barred by any provision of this code and the complaint is dismissed or the action is discontinued or abates because of the plaintiff's death, the time between the commencement and the termination of the action is not a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defense or to interpose the same defense in another action brought by the same plaintiff or a person deriving title from or under him.~~"

Section 6. Section 27-2-409, MCA, is amended to read:

"27-2-409. Acknowledgment of debt or part payment. ~~No acknowledgment or promise is evidence of a new or continuing contract~~ An acknowledgment or the part payment of a debt is sufficient evidence to cause the relevant statute of limitations to begin running anew.

(1) ~~unless the same is~~ An acknowledgment must be

contained in some writing signed by the party to be charged thereby.

(2) ~~However, this section does not alter the effect of~~ Part payment is any payment of principal or interest, ~~which payment is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.~~"

-End-

a fiscal note coming for this bill. Senator Mazurek asked what he thought about the $50 reinstatement fee. Senator Van Valkenburg felt it was a little steep.

Senator Blaylock felt these people who get their license suspended will still keep driving anyway. Senator Van Valkenburg responded he did not know what to do with those people, especially when the jails are full, but somehow there will be room for them.

Senator Halligan inquired about a provisionary license before the suspension, because maybe someone is really working hard to pay a fine but needs their car to work. Senator Van Valkenburg said most judges know who is making a good faith try to pay and this bill is for those who don't try at all.

Senator Beck asked if someone does leave town, who is going to pick up the license and does the fiscal note have something to do with that. Senator Van Valkenburg responded that under the current law the highway patrol picks up suspended licenses, and they assign, on a rotation bases, officers to this duty, and that is where the fiscal note does come into this bill.

Senator Van Valkenburg closed on SB 181.

CONSIDERATION OF SB 160: Senator Joe Mazurek of Helena presented SB 160 to the committee on behalf of the Montana Supreme Court and the Commission on the Rules of Evidence. The bill will revise and clarify the laws relating to statutes of limitation for the commencement of civil actions. He gave copies of the changes and an explanation to each change to the committee (see Exhibit 3).

PROPONENTS: Sam S. Hadden, Commissioner on the Rules of Evidence, said the bill is an out growth of a bill that was passed in the 1983 Legislature that asked the court to supervise the Commission in review of the statute of limitations and venue statutes. He stated it was not the Commission's intent to change the law or develop it beyond the point the Supreme Court had set. He said the entire code has 33 sections and the Commission only change six of the sections. He said the Commission worked under the Supreme Court.

Karl Englund, Montana Trial Lawyers Association, testified in favor of the bill, but had a problem with page 2, section 3, line 4, which deals with the "time clock" on the statute of limitations, which doesn't begin to run until a person knows that they were harmed; if the injury is by its nature concealed or self-concealing. He said that in both subsection (3) and (3a) it is the discovery of the injury that starts the statute of limitation and he felt the reading of the case law cited in the explanation of the bill says it is not just the discovery of the injury

but the discovery of the facts constituting the claim. Mr. Englund relayed a story of a man killed in a car accident and there was no explanation. He said the wife and patrolman ran an investigation and an engineer even checked the car. He said five year later the U.S. department of Transportation "called back" the kind of car the husband was driving, because it had bad breaks; and the wife knew the date of her husband's death, so she took steps to find out what happen, but it wasn't until five years later that she was able to discover what would allow her to bring a claim. He pointed out to look at the cases cited in the explanation of the bill on page 3, (see Exhibit 3) Interstate Manuafacturing Company vs. Interstate Products is one case. He said the plaintiff is not just ignorant of his injury, but his whole cause of action. He stated on page 4 there are three cases sited: Thompson vs Nebraska which the plaintiff didn't discover the injury defect in the mobile home and so the court said the "time clock" began when the person discovered the defect, which is the injury. He explained the Bennett vs. Dow case where the plaintiff tried to make a claim, which the statute did not begin to run until he had talked to a lawyer who felt he had a law suit. He said the Supreme Court rejected that because it would prevent the running of the statute of limitations for someone who has never talked to a lawyer. He handed out an amendment (see Exhibit 4). He felt in doing so he had used the court's language and made clear the plaintiff must discover the facts to give rise to a claim; not to extend the statute of limitations.

Pat Melby, State Bar of Montana, supported SB 160 and appreciated the Commission trying not to extend the law.

OPPONENTS: None

DISCUSSION ON SB 160: Senator Pinsoneault asked why "injury" couldn't be left in the bill and just insert "or facts constituting the claim". Mr. Englund felt it would be fine to do it that way. Senator Yellowtail asked Mr. Hadden to respond to that. Mr. Hadden said the Commission did not focus on that specifically, but said the historical approach the court has taken has been to refer this subject matter to the word "injury"; that is the discovery of the injury with the exceptions spelled out in the latter part of the section. He said this will trigger the running of the period. He said there are exceptions, like the surgeon leaving a spunge in a patient and the patient is not aware until it becomes a problem in healing.

Senator Mazurek closed by saying he hoped the Commission, Karl Englund, and Pat Melby can work together for this bill so the committee can pass it out.

The committee adjourned at 11:40 a.m.

Joseph P. Mazurek
Chairman

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Jan. 29

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

DATE Jan. 29th

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Gary Deschis	City Judge East Helena	SB181	✓	
Neil Travis	City Judge Livingston	SB181	—	
Lyn Haynes	Mt. Mag Assn	SB181	✓	
Sam J Hamilton	Commission on Cts & Jud.	SB181	✓	

(Please leave prepared statement with Secretary)

Statutes of Limitation

Section 1. Section 27-2-102, MCA, is amended to read:

27-2-102. For the purposes of statutes relating to the time within which an action must be commenced: ~~an--action--is--commenced--when--the--complaint--is filed;~~

(1) a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action;

(2) an action is commenced when the complaint is filed.

(3) Unless provided otherwise by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued, does not postpone the beginning of the period of limitation.

(4) The period of limitation does not begin on any claim or cause of action for an injury to person or property until the injury has been discovered, or, in the exercise of due diligence, should have been discovered by the injured party, if:

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(1) The injury is, by its nature, concealed or self-concealing, or

(2) Before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

(3) Nothing in this sub-section shall affect the provisions of section 27-2-205, MCA.

Explanation of amendments to section 27-2-102

These amendments of section 27-2-102 MCA will put the provisions governing the beginning and ending of periods of limitations into a single statute, which seems to be the most understandable arrangement.

Subsection (1)

Subdivision (1) is new and incorporates the rule accepted throughout the United States, that a statute of limitation can begin to run against a potential plaintiff only when the claim or cause is complete to the point that a suit can be instituted on it. It prevents the anomalous and unjust situation in which a period of limitation may begin running against a person and possibly run out while he has no legal power to file the complaint that would toll the statute. The principle has been accepted and uniformly applied in Montana cases; *Northern Pacific Ry. Co. vs. Smith*, 62 Mont. 108, 203 Pac. 503 (1921), (action in ejectment); *Viers vs. Webb*, 76 Mont. 38, 245 Pac. 257 (1926) (action for possession of personal property); *Heckaman vs. Northern Pacific Ry. Co.*, 93 Mont. 363, 20 P.2d 258 (1933) (negligent injury to real property); *State ex rel DeKalb vs. Ferrell*, 105 Mont. 218, 70 P.2d 290 (1937) (action for payment of public obligation), and many others.

Subsection (2)

This is the present language of section 25-2-102 without change.

Subsection (3)

The rule that knowledge of the existence of a claim or cause of action by the person to whom it has accrued is not required to begin the running of the period of limitation has been part of our law since the beginning. Although not

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mentioned in the Code, it was referred to as an existing principle in *Yore vs. Murphy*, 18 Mont. 342, 45 Pac. 217 (1896). *Kerrigan vs. O'Meara*, 71 Mont. 1, 227 Pac. 819 (1924) reaffirmed the rule and is the case usually cited as authority for it. Since *Kerrigan* it has been unquestioned. *Bennett vs. Dow Chemical*, _____ Mont. _____, 713 P.2d 992 (1986) is the latest of a long series of cases citing and applying it.

Originally, there was only one exception to the rule, Section 27-2-203, MCA, stating that the period of limitation on actions for fraud or mistake does not begin "until the discovery by the aggrieved party of the facts constituting the fraud or mistake." The definition of "fraud" was expanded to include breaches of fiduciary duties by *Skierka vs. Skierka Bros., Inc.*, _____ Mont. _____, 629 P.2d 214 (1981), but the text of the statute itself has not been changed.

Of recent years, additional statutes have been passed, some included in the general statute of limitation laws (like sections 27-2-205 and 27-2-206, MCA, on medical and legal malpractice) and some not (like section 30-2-725(2), MCA, covering warranties of performance of goods).

The exception clause in this amendment seeks to avoid conflict with these and any other statutes, existing or future. It also attempts to incorporate without interference the substantial development of the "discovery" doctrine by the Supreme Court during the past twenty years.

Subsection (4)

The primary purpose of this subsection is to incorporate the comparatively recent case extensions of the discovery principle which are obviously of major importance.

The earliest of these exceptions seems to be *Interstate Manufacturing Co. vs. Interstate Products*, 146 Mont. 449, 408 P.2d 478 (1965). It was a conversion action where defendants claimed that the applicable statute of limitations had run before the action was filed. The Supreme Court rejected the contention, saying:

> However, the statute of limitations does not commence to run on the date of the transfer where the plaintiff is ignorant of his cause of action and such ignorance is neither willful nor the result of negligence .... (Many cases hold that the statute runs regardless of the plaintiff's lack of knowledge. However, the reason for these rulings seems to be that in such cases ignorance is the result of want of diligence and the party cannot thus take advantage of his own fault ....).

In the *Interstate* case the Court found that the conversion was a deliberate act, concealed from the plaintiff-owners, which could not have been discovered by the exercise of due diligence.

The kind of deliberate injury dealt with by the case is comparatively rare and has not figured in subsequent litigation, but, the following year, the question arose

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again in the more active field of negligent injuries and set in motion a current of change not yet finished.

A major expansion by judicial decision, now partially codified, began in *Johnson vs. St. Patrick's Hospital*, 148 Mont. 125, 417 P.2d 469, in 1966. That case recognized a national trend which permits postponement of the period of limitation in surgical malpractice cases. *Johnson* authorized such deferment only when foreign objects were left in a surgical incision, but was quickly followed by other cases extending the new doctrine, which the Court called "fraudulent concealment", to all medical malpractice (see *Grey vs. Silver Bow County*, 149 Mont. 213, 425 P.2d 819, and *Monroe vs. Harper*, 164 Mont. 23, 518 P.2d 788) and, inferentially at least, to many other kinds of actions (see *Carlson vs. Ray Geophysical*, 156 Mont. 450, 481 P.2d 327). This series of opinions held, in brief, that statutes of limitation should not begin to run on negligent injuries until the injuries were or should have been discovered, if they were of such a nature that they concealed themselves or if, after the negligent act was committed, the defendant concealed the facts from the injured party.

In 1971 this line of cases was codified for medical malpractice suits (Sec. 27-2-205, MCA) and in 1977 similar treatment was given to legal malpractice (Sec. 27-2-206, MCA). Some more recent cases have invoked the "discovery" doctrine without connecting it to "fraudulent concealment" or the *Johnson-Monroe-Carlson* line of decisions. *Thompson vs. Nebraska Mobile Homes*, 198 Mont. 461, 647 P.2d 334 (1982); *Masse vs. State Highway Department*, _____ M _____, 664 P.2d 890 (1983); and *Bennett vs. Dow Chemical*, _____ M _____, 713 P.2d 992 (1986) all discuss the application of the discovery doctrine, although the Court applied it only in the *Thompson* case. *Thompson* invoked the discovery principle in a product liability situation, and *Masse* and *Bennett* held that it might have been applicable if the facts had been more thoroughly documented or somewhat different from those presented.

Sub-section (4) seeks to codify the principles established in these cases without (1) restricting the power of the Court to define further the scope of the discovery doctrine, or (2) creating a conflict with those existing statutes which have already incorporated the Court's decisions in the medical malpractice area.

Section 2. Section 27-2-301, MCA, is amended to read:

27-2-301. When demand necessary to perfect right to action. Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when ~~the right to make~~ the demand is ~~complete~~, made, except ~~in one of the following cases:~~

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~~(1)--W~~ where the right grows out of the receipt or detention of money or property by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends.

~~(2) Where there was a deposit of money not to be paid at a fixed time but only upon a special demand or a delivery of personal property not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.~~

Explanation of Section 2

This change is intended merely to clear up the difficulties in a statute the courts have never been able to make sense of, and to reflect what the decided cases have indicated should be done with it. This code section, as originally enacted, laid down the basic rule that wherever a demand was necessary to entitle the demanding party to bring an action the period of limitations ran, not from the demand or its refusal, *but from the time that the right to make the demand was complete.* Thus, the statute could be running against a potential plaintiff while he had no right to bring an action (obviously violating the basic principle expressed in the other limitation statutes and in leading cases like *Heckaman vs. N.P. Ry.*, supra). Exceptions were made for possession by fiduciaries or agents and for demand deposits of money or property, which dated the limitation period from the *demand* or from the *knowledge of facts giving rise to a right to make a demand.* These provisions were clearer but did not help in determining when and to what situation the basic rule of the section applied.

In the leading case of *Gates vs. Powell*, 77 Mont. 554, 252 Pac. 377 (1926) the Supreme Court complained that:

> It must be admitted that the statute is not free from ambiguity, and that its language is not easy of application. The legislative intent of this statute is not clear.

The court's solution to the problem has been to find, in each case, that the "basic rule" did not apply, and to date the beginning of the period of limitation from the making of the demand.

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This recommended change would simply conform the statute to the actual practice adopted in these cases.

Section 3. Section 27-2-401, MCA, is amended to read:

27-2-401. When person entitled to bring action is under a disability. (1) If a person entitled to bring an action mentioned in part 2, except 27-2-211(3), is, at the time the cause of action accrues, either a minor, seriously mentally ill, or imprisoned on a criminal charge or under a sentence for a term less than for life, the time of such disability is not a part of the time limited for commencing the action. However, the time so limited cannot be extended more than 5 years by any such disability except minority ~~or, in any case, more than 1 year after the disability ceases~~.

(2) If an action is barred by 27-2-304, any of the heirs, devisees, or creditors who at the time of the transaction upon which the action might have been founded was under one of the disabilities mentioned in subsection (1) may, within 5 years after the cessation of such disability, maintain an action to recover damages. In such action he may recover such sum or the value of such property as he would have received upon the final distribution of the estate if an action had been seasonably commenced by the ~~executor or administrator~~ personal representative.

(3) No person may avail himself of a disability unless it existed when his right of action or entry accrued.

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(4) When two or more disabilities coexist at the time the right of action or entry accrues, the limitation does not attach until ~~they~~ all are ~~both~~ removed.

Explanation of Section 3

This disability section is, if the number of decided cases concerned with it is a reliable guide, very seldom used. No part of it has caused real difficulty except the "1 year after the disability ceases" clause, which the Supreme Court has found opaque to the point of unintelligibility.

In the instance of disability for minority, the court has ruled that the minor has the full statutory period after reaching majority within which to sue and that the one-year clause has no application (*Smith vs. Sturm, Ruger and Co. Inc.*, ____ M. ____, 643 P.2d 576). The leading case on mental illness rejected defendant's claim that the one-year provision could shorten, as well as lengthen, the time allowed for bringing suit and the court tried to find a construction which would give it some effect without destroying plaintiffs' rights in the process. The court's rather tentative conclusion was that, whatever the full meaning of the clause, there was no reason to apply it in the case (*Hi-Ball Contractors, Inc. vs. District Court*, 154 M. 99, 460 P.2d 751). After citing *Hi-Ball Contractors*, in *Smith vs. Sturm, Ruger*, the court pointed out that it had managed to reach the result in spite of the fact that the statutory section "is hardly a model of good draftsmanship."

This amendment would simply abolish the troublesome "one-year" portion of the statute and treat all disabilities alike. Minors would continue to have the full period of limitations in which to file actions after the disability ceases, and so would those disabled by mental illness or imprisonment. In the latter two instances, however, the statute would also begin to run even during the continuance of the disability after it had continued for five years.

In subsection (2) the term "personal representative" has been substituted for "executor or administrator" to make this statute conform to the language of the Probate Code and the Rules of Civil Procedure.

A minor change has been made in subsection (4) to correct the grammar.

Section 4. Section 27-2-402, MCA, is amended to read:

27-2-402. When defendant is out of state. If when the cause of action accrues against a person he is out of the state and cannot be served with

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process, the action may be commenced within the term herein limited after his return to the state; and if after the cause of action accrues he departs from the state and cannot be served with process, the time of his absence is not part of the time limited for the commencement of the action.

Explanation of Section 4

The added language incorporates exceptions to this section created in the cases of *State ex rel. McGhee vs. District Court*, 162 Mont. 31, 508 P.2d 130 (1973) and *Beedie vs. Shelley*, 187 Mont. 556, 610 P.2d 713 (1980). The cases held that the original intention of section 27-2-401, MCA, was to protect a plaintiff's right to sue if the prospective defendant left the jurisdiction and thus made himself immune to service of process for all or part of the period of limitation. At the time the statute was adopted, rulings of the U.S. Supreme Court prohibited service of process in state actions outside the state's boundaries. When the federal rule was changed and Montana adopted a valid method of serving process beyond its borders [Rule 4, Montana Rules of Civil Procedure] the need for the statute, in most cases, was gone.

McGhee and *Beedie* ruled that the running of the period of limitation could be postponed or interrupted *only* where the defendant was not only absent but "not capable of being served." The amendments reflect the change and conform the statute to the existing state of the law.

Section 5. Section 27-2-408 reads:

27-2-408. Counterclaims. A defendant is entitled to assert against a plaintiff, by pleading or amendment, any counterclaim, arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against him, which existed at the time of the commencement of the plaintiff's action against him. The time between the commencement and termination of the action is not part of the time limited for the commencement of an action by the defendant to recover for the

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counterclaim or to interpose it in that action or another action by that plaintiff or a successor arising out of the same transaction or occurrence.

Explanation of Section 5

This new section is a replacement for the present section bearing the same number which was designed to fit the types of counterclaims and pleadings used under the old Code of Civil Procedure. The changes made will continue the basic policies formerly in force but adapt them to the current Rules of Civil Procedure.

Both the old and new sections provide that the filing of a plaintiff's complaint tolls the applicable statute of limitations on existing counterclaims by the defendant as well as on the plaintiff's own claim. The new statute, however, makes it clear that its provision applies only to counterclaims arising from the same transaction, that is, compulsory counterclaims under Rule 13(a), M.R.Civ.P., and not Rule 13(b) permissive counterclaims. It incorporates the interpretation given to the old statute in *Francisco vs. Francisco*, 120 Mont. 468, 191 P.2d 317 (under a different method of classifying counterclaims) and the majority rule in the federal courts under the Rules of Civil Procedure (Wright and Miller, Federal Practice and Procedure, Vol. 6, 1419, p. 109).

The new section also carries forward the former guarantee that the period of limitation on the counterclaim would not run during the continuance of the action. This is intended to preserve the status quo between the parties and remove any possibility that the period of limitation could be tolled as to one party's claim, but continue running, or begin running again, on the other's.

The provision that the counterclaim may be asserted "by pleading or amendment" is intended to conform to Rule 13(f), M.R.Civ.P., permitting, by leave of court, the addition of omitted counterclaims. Although the question has not yet been before the Montana Supreme Court, the federal courts have held under the identical rule that "amendment" includes either the formal procedure authorized by Rule 15(a) or amending by introduction of non-conforming evidence at the trial under Rule 15(b).

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Section 6. Section 27-2-409 reads as follows:

27-2-409. Acknowledgment of debt or part payment. Acknowledgment or part payment of a debt is evidence of a new or continuing contract sufficient to cause the relevant statute of limitation to begin running anew. An acknowledgment must be contained in some writing signed by the party to be charged thereby. Part payment is any payment of principal or interest.

Explanation of Section 6

This new section is a substitute for the older statute bearing the same number. It is re-phrased for clarity but does not change the law. The alterations in language and arrangement are extensive enough to prevent a simple amendment of the old statute but have no object other than to make explicit what the Supreme Court has said the old law really means.

The old code section details what must be contained in a proper acknowledgment, but never sets out the basic principle (with which the new statute begins) that an acknowledgment or part payment starts the limitation period over from the beginning. The new draft repairs this defect but preserves as much as possible of the original language to leave no doubt that all the legal rules stated in cases construing the old act (like *Galvin vs. O'Gorman*, 40 Mont. 391, 106 Pac. 887; *Mercer vs. Mercer*, 120 Mont. 132, 180 P.2d 248; and *Betor vs. Chevalier*, 121 Mont. 337, 193 P.2d 374) remain unchanged.

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EXHIBIT NO. 3
DATE 1-29-87
BILL NO. S.B. 160

SENATE JUDICIARY
EXHIBIT NO. 4
DATE Jan. 29, 1987
BILL NO. SB 160

PROPOSED AMENDMENTS FOR SB160-- AN ACT TO GENERALLY REVISE AND CLARIFY THE LAWS RELATING TO STATUTES OF LIMITATION ON COMMENCEMENT OF A CIVIL ACTION

1) Page 2, line 6, after the word "until"
   STRIKE: "the injury"
   INSERT: "the facts constituting the claim"

2) Page 2, line 6,
   STRIKE: "has"
   INSERT: "have"

3) Page 2, line 9,
   STRIKE: "injury is by its"
   INSERT: "facts constituting the claim are by their"

SENATE JUDICIARY
EXHIBIT NO. 5
DATE Feb. 3, 1987
BILL NO. SB 160

PROPOSED AMENDMENTS FOR SB160-- AN ACT TO GENERALLY REVISE AND CLARIFY THE LAWS RELATING TO STATUTES OF LIMITATION ON COMMENCEMENT OF A CIVIL ACTION

England

1. Page 2, line 6, ~~after the word "until"~~ Following: "injury"
STRIKE: ~~"the injury"~~ "has"
INSERT: "~~the~~ facts constituting the claim "have"

~~2. Page 2, line 6,~~
~~STRIKE: "has"~~
~~INSERT: "have"~~

2. Page 2, line 9. Following: "injury"
STRIKE: ~~"injury is by its"~~ "is by its"
INSERT: "facts constituting the claim are by their"

SENATE JUDICIARY
EXHIBIT NO. 6
DATE Feb. 3, 1987
BILL NO. SB 160

BE AMENDED AS FOLLOWS:

1. Page 2, line 6.
Following: "injury"
Strike: "has"
Insert: "or facts constituting the claim have"

2. Page 2, line 9.
Following: "injury"
Strike: "is by its"
Insert: "or facts constituting the claim are by their"

BE AMENDED AS FOLLOWS:

1. Page 2, line 6.
Following: "injury"
Strike: "has"

Strike: "is by its"

Following: "injury"
BE AMENDED AS FOLLOWS:

1. Page 2, line 6.
Following: "injury"
Strike: "has"
Insert: "or facts constituting the claim have"

2. Page 2, line 9.
Following: "injury"
Strike: "is by its"
Insert: "or facts constituting the claim are by their"

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Feb. 3

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

STANDING COMMITTEE REPORT

February 3 19 37

MR. PRESIDENT

We, your committee on Senate Judiciary

having had under consideration Senate Bill No. 160

first reading copy (white color)

An act to generally revise and clarify the laws relating to statutes of limitation on commencement of a civil action.

Respectfully report as follows: That SENATE BILL No. 160

BE AMENDED AS FOLLOWS:

1. Page 2, line 6.
Following: "injury"
Strike: "has"
Insert: "or facts constituting the claim have"

2. Page 2, line 9.
Following: "injury"
Strike: "is by its"
Insert: "or facts constituting the claim are by their"

AND AS AMENDED

DO PASS

~~DO NOT PASS~~

Senator Mazurek Chairman.

that section only covered highway patrolmen. It will now cover the Department of Justice's employees.

Rep. Lory asked Ms. Kradolfer if the Department of Justice would charge the regular amount for an expert witness. She stated they would charge what it costs exactly to have that witness there so, it would be just reimbursement. Rep. Mercer asked Ms. Kradolfer what the costs will be for the county. She stated there have not been any figures worked up yet but the fiscal note attached states that for civil costs it comes to $15,000.00.

Rep. Mercer asked Ms. Kradolfer if the county prosecutors could work to get people moved through quicker and she stated it just does not work that way.

Senator Gage pointed out that in criminal cases the costs to the courts are born by the state at the present time and the intent of the bill is to get people to quit abusing the lab people and he closed the hearing on SB 164.

SENATE BILL NO. 160: Senator Mazurek, District No. 23, stated this bill was introduced by the request of the Montana Supreme Court and the Supreme Court Commission on the rules of evidence. It generally revises and clarifies the laws relating to the statutes of limitation on the commencement of a civil action. This bill makes the current statutes conform with court cases and it is not the intent of the bill to make any substitive change in the law of the statute of limitations. Section 27-2-102 is amended and provides as a general rule, that the statute of limitations or the period that determines when the time starts to run, when all of the elements of a claim or cause exist or have occurred and the right to maintain the action is complete. The lack of knowledge of the claim does not postpone the beginning of the period of limitation. Subsection (1) is new and incorporates the rule accepted throughout the United States, that a statute of limitation can begin to run against a potential plaintiff only when the claim or cause is complete to the point that a suit can be instituted on it. The statute of limitations does not stop running on an out of the state person if you can not get service on the person. He stated that where the right grows out of the receipt or detention of money or property by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends. He submitted a written explanation of the bill. (Exhibit A).

PROPONENTS: KARL ENGLAND, Montana Trial Lawyers Association, stated this is a good bill and the Association

ACTION ON SB 160: Karl Englund presented some amendments (see Exhibit 5). Senator Pinsoneault thought the Englund amendments was too complex and redundant. The committee discussed different language for the amendments (see Exhibit 6). Senator Blaylock wanted to use the word "have" over the word "has" in the amendments (Exhibit 6). Senator Pinsoneault moved the amendments (Exhibit 6). The motion CARRIED.

Senator Brown moved the bill DO PASS AS AMENDED. The motion CARRIED.

ACTION ON SB 181: Valencia explained the amendments she prepared for the committee (see Exhibit 7). Senator Halligan did not like amendment #8 because he thought the reinstatement fee should be $25 instead of $50. Senator Halligan moved the amendments and changed the $50 to $25 in the 8th amendment. The motion CARRIED.

Senator Mazurek said some of the judges wanted to see Chapter 12, juveniles, included in this bill. Senator Brown moved to include Chapter 12 into the bill (2nd amendment on the Standing Committee Report). The motion CARRIED.

Senator Brown moved the bill DO PASS AS AMENDED. Senator Mazurek said the bill is not a simple thing of "not paying the fine" issue, but making sure that the one who never thinks he will have to pay the fine, will pay the fine. The motion CARRIED with Senator Beck voting no.

CONSIDERATION OF SB 52 AGAIN: Andrea Bennett, the State Auditor, presented to the committee information on how the insurance rate system works now and how the bill would work. She gave the committee information on the collected fees a year and the insurance regulation budget (see Exhibit 8). She also gave the committee a graph on expenditures vs. fees (see Exhibit 9). She also presented flex rating personnel vs. modified request of this Legislature (see Exhibit 10). She explained she has two half-time people who work with the insurance rates system. She said she has no one with financial background that could tell if the rates are discriminatory or not. She said the Auditor's Office will need both the modifieds and the flex system for the bill to work. She also mentioned that she had no investigators in the Auditor's Office to look at the insurance rates. Senator Brown asked why the flex system is the better system. Ms. Bennett replied that a band will keep the rates stable where the system now is not doing that. Senator Mazurek asked if the flex rating system was to pass, would the department be able to do the job without the extra funding. Ms. Bennett said they could not. Senator Crippen stated that while the flex system does has good merit to it, it has not worked out all the problems of this division. He suggested that Montana really study the other states that have this and find out the weakness in the system. Ms. Bennett felt the flex is more fair to people. She said the policy holders are paying $647,000 into the General Fund and that is not fair. Ms. Bennett said it is hard to compare other states insurance rates systems to ours because every state has different insurance rates.

The committee adjourned at 12:00 p.m.

Dorothy P. Mazurek

Chairman

supports it. He pointed out that missing the statute of limitations rules is the biggest single cause of lawyer malpractice.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 160: Rep. Gould asked Mr. England if this bill is enacted, will insurance rates go down for attorneys. He answered, "no".

Rep. Bulger asked Mr. England if section 27-2-401 conflicted with the Asay bill and he stated it does not because the specific statute on medical malpractice will govern medical malpractice actions.

Rep. Mercer stated he is concerned with the new section 4 regarding service of out-of-state people. Mr. England was asked to explain why this section was not tied down tighter because anyone can be served by process. Mr. England referred him to page 8 of the explanation (see Exhibit A) and the Commission says that there are two cases McGhee vs. District Court and Beedie vs. Shelley where the court has held that the period of limitations could only be postponed or interrupted where the defendant was not only absent but not capable of being served. The old law on statute of limitations was written before the expansion of an ability to serve someone under rule 4 of the rules of civil procedure.

Senator Mazurek closed the hearing on SB 160.

SENATE BILL NO. 181: Senator Van Valkenburg, District No. 30, stated that SB 181 was introduced at the request of the Montana Magistrates Association and it is designed to aid in the enforcement of fines that are imposed in the court system. He explained if a person is given a fine and fails to pay the fine this bill requires suspension of a driver's license to appear in court or failure to pay a fine, costs or restitution after conviction of certain offenses. This bill further requires payment of a reinstatement fee of $25.00. The purpose of this bill is to give judges a mechanism to work with in collecting these fines. The bill will generate a total of $117,000.00 to $160,000.00 a year and $60,000.00 to $80,000.00 will go into the state general fund.

PROPONENTS: BERNIE MCCARTHY, Montana Magistrates Association, stated they support this piece of legislation for the simple reason they need more teeth as an aid in collecting fines and costs. SB 181 gives us additional powers to give the incentives to pay fines. He proposed an amendment to section 2, paragraph 2, to read, "$25.00 to the motor vehicle division". Written testimony was submitted. (Exhibit A).

EXHIBIT 17
DATE 3-13-87
SB # 160

Statutes of Limitation

Section 1. Section 27-2-102, MCA, is amended to read:

27-2-102. For the purposes of statutes relating to the time within which an action must be commenced: ~~an--action--is--commenced--when--the--complaint--is filed;~~

(1) a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action;

(2) an action is commenced when the complaint is filed.

(3) Unless provided otherwise by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued, does not postpone the beginning of the period of limitation.

(4) The period of limitation does not begin on any claim or cause of action for an injury to person or property until the injury has been discovered, or, in the exercise of due diligence, should have been discovered by the injured party, if:

Followed were 9 more pages, identical to those submitted to the Senate Judiciary Committee.

ACTION ON SENATE BILL NO. 258:

Rep. Giacometto moved that SB #258, Be Concurred In. Question was called and a voice vote was taken. The motion CARRIED unanimously. SB #258, BE CONCURRED IN.

ACTION ON SENATE BILL NO. 289:

Rep. Gould moved that SB #289, Be Concurred In. Question was called and a voice vote was taken. The motion CARRIED unanimously. SB #289, BE CONCURRED IN.

ACTION ON SENATE BILL NO. 361:

Rep. Strizich moved that SB #361, Be Concurred In. Rep. Eudaily moved amendments. Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Strizich moved that SB #361, Be Concurred In As Amended. Question was called and a voice vote was taken. The motion CARRIED unanimously. SB #361, BE CONCURRED IN AS AMENDED.

ACTION ON SENATE BILL NO. 160:

Rep. Mercer moved that SB #160, Be Concurred In. Rep. Mercer moved an amendment on page 2, lines 6 and 9. Question was called and a voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached). Rep. Mercer moved that SB #160, Be Concurred In As Amended. Question was called and a voice vote was taken. The motion CARRIED 14-1, with Rep. Daily dissenting. SB #160, BE CONCURRED IN AS AMENDED.

ADJOURNMENT: There being no further business before the Committee, the meeting was adjourned at 10:00 a.m.

Rep. Earl Lory, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 13, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)		✓	
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)		✓	
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

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VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE BILL NO. 160 DATE March 13, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Bill Leary	MT. Hosp Assn	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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HOUSE

STANDING COMMITTEE REPORT

(79)

MARCH 23, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 160

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☒ as amended
☐ statement of intent attached

Earl Lory
Chairman

Page 2, lines 6 and 9.
Strike: "injury" on lines 6 and 9
Strike: "OR" on lines 6 and 9

THIRD reading copy (BLUE color)

REP. MERCER WILL CARRY THE BILL!

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 23, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

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